

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL MAYBERRY,

Defendant-Appellant.

UNPUBLISHED

April 5, 2005

No. 242186

Wayne Circuit Court

LC No. 01-000862

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendant appeals by right from his convictions of assault with intent to do great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to fourteen months to ten years’ imprisonment for the assault conviction, to be preceded by a consecutive sentence of two years’ imprisonment for the felony-firearm conviction. We affirm.

As his sole issue on appeal, defendant claims he was denied the effective assistance of counsel because his trial counsel failed to investigate, interview, and present witnesses who would have undermined the credibility of the complainant’s testimony, and failed to meet with defendant while he was on bond awaiting trial except at the courthouse in connection with pretrial proceedings. Defendant also argues that counsel erred by pursuing a defense trial strategy that the shooting was accidental, which dissuaded defendant from testifying on his own behalf in support of a theory of self-defense.

Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defendant must establish that counsel’s performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms and that the deficiency was so prejudicial that he was deprived of a fair trial. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In other words, defendant must establish a reasonable probability that but for counsel’s alleged unprofessional errors the trial outcome would have been different. *Id.* at 694; *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Here, defendant argues that trial counsel failed to call certain witnesses at trial, but did not present testimony or affidavits to the trial court in support of his motion for a new trial as to

how the witnesses would have testified. Thus, defendant has failed to establish the factual predicate for his claim of ineffective assistance of counsel. *Id.* Likewise, while defendant faults trial counsel for failing to meet with him more extensively before trial, he does not indicate how any deficiency in this regard affected counsel's performance at trial, consequently, he has not shown a reasonable probability that this affected the result of the proceeding as is required to establish an ineffective assistance of counsel claim. *Id.*

Defendant's argument that counsel pursued the wrong trial strategy also fails. The very argument concedes that counsel's decision in this regard was strategic and because the trial court found that evidence supported this defense theory, it was clearly reasonable. This Court will not second-guess counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A failed trial strategy does not constitute ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Although defendant asserts counsel's selected strategy affected his decision to not testify, the record reflects that the trial court asked defendant if he desired to testify and it was defendant, not counsel, who exercised that choice. Finally, defendant cannot establish the alleged error was outcome determinative because counsel in fact argued self-defense in his closing argument, and the trial court specifically considered but rejected this defense theory. Thus, the alleged error does not undermine confidence in the verdict. *Carbin, supra* at 600.

For the foregoing reasons, defendant has not established that he is entitled to relief based on his claim of ineffective assistance of counsel.

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell